In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 716

HARRY H. WINER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a–16a) is reported at 228 F. 2d 944.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1956 (Pet. App. 1a), and a petition for rehearing was denied on February 3, 1956.[1] The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] The judgment of the Court of Appeals and the denial of the petition for rehearing are attached to the back of the Appendix to Appellant's Brief in the Court of Appeals, filed as the record in this Court, and are unnumbered.

QUESTIONS PRESENTED

1. Whether the shipments from which the goods were stolen had lost their character as interstate shipments of freight as of the time of theft.

2. Whether petitioner was denied a fair trial in that three jurors who sat at his trial had previously sat at the severed trial of a co-defendant.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The relevant portion of the Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *.

18 U. S. C. 659 provides in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or
>
> Whoever buys or receives or has in his possession any such goods or chattels,

knowing the same to have been embezzled or stolen; * * *

* * * * *

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both * * *

STATEMENT

Petitioner was tried on two indictments, each charging an offense of buying and receiving property that was stolen while a part of an interstate shipment of freight in violation of 18 U. S. C. 659 (R. 4–8, 10). One charged him with receiving on February 10, 11, and 13, 1954, certain pistons, bearings, and copper wire which had been stolen from two Southern Railway Company railroad cars located on a railroad siding of that company in Chattanooga, Tennessee, with the knowledge that they had been stolen (R. 4–6). The other charged him, and one Marvin Siskin, with buying and receiving copper wire on February 15, 1954, from the same two railroad cars with guilty knowledge (R. 7–8).

Three witnesses testified that they had stolen the goods from the two railroad cars standing in the yards of the Southern Railway at Chattanooga, in the early part of February, and had sold some of them to petitioner, a junk dealer (R. 58–67, 73–81, 85–90), and some to Siskin, another junk dealer (R. 61, 66–67, 88). Evidence

was also adduced as to petitioner's belligerent attitude when questioned about the stolen goods and to the fact that he was not keeping records of material he purchased as required by city ordinance (R. 100, 139–140). Petitioner denied that he received any goods from the three witnesses who testified they had stolen them (R. 124). He stated that he did buy some copper wire from Siskin in good faith (R. 128). Five character witnesses attested to his good reputation in the community (R. 142–144). The jury found petitioner guilty (R. 163), and he was sentenced to a total of two years imprisonment (R. 182).

The facts relevant to petitioner's contention that the goods were not stolen from an interstate shipment of freight may be summarized as follows:

Each of the cars from which the goods were stolen contained shipments from the Southern Railway Company as shipper to itself at Chattanooga, Tennessee (R. 34, 38) and had crossed one or more state lines enroute to Chattanooga (R. 24, 38). One of the cars arrived in the Chattanooga yards on January 24, 1954 and the other car arrived on February 4, 1954 (R. 55). The arrival of the cars was noted in the "car book" of the general foreman of the Storage Department "under the record of cars in the yard" (R. 55), and on arrival the seals on the cars were checked to see that they were intact

(R. 50). The cars were then placed on track 22 which was one of several parallel tracks in the yard one end of which ran 50 or 75 feet from the railroad storehouse (R. 33). Sometime before the 16th of February, while the cars were still on track 22 under the original seals placed on them when loaded, the thefts occurred (R. 50–52, 58, 110). Both the division officer of the railroad (R. 44) and the general foreman of the storage department (R. 50) testified that the shipment was not regarded as received by the company until the car was opened and the materials checked out and placed in the company warehouse. The material in the cars on track 22 could not be unloaded for company purposes until the transportation department, on orders from the storekeeper, moved the cars from track 22 to track 1 (R. 29). One car was moved to track 1, opened and unloaded on March 1, 1954 (R. 52), and the other was shipped out on June 21, 1954 (R. 53) upon receipt of a new set of orders from the company's Washington office (R. 57). The trial court submitted to the jury the question whether the goods were still in commerce at the time of the theft, or whether, as contended by petitioner, the shipments had been delivered to and accepted by the railroad's storekeeper while the car was on track 22 and accordingly no longer constituted an interstate shipment of freight (R. 159–160). The jury in returning a verdict of guilty resolved this question in favor of the Government (R. 163).

The facts relevant to petitioner's contention that he was denied a fair trial, on the ground that three of the jurors had previously sat on the trial of Siskin, may be summarized as follows:

Siskin had been indicted with petitioner for buying and receiving property that had been stolen from the same two railroad cars. Petitioner had successfully moved that the cases against him and Siskin be tried separately (R. 8–10). Siskin was tried first, introduced no proof, and was found guilty (R. 1–2). The next day petitioner went to trial (R. 2). Three of the jury empaneled to sit on petitioner's trial had previously sat on Siskin's trial (R. 146).

The record does not indicate whether the three jurors were challenged for cause by petitioner at the time they were empaneled (R. 10–14). In petitioner's motion for a mistrial and a new trial he alleged that he did challenge them for cause (R. 145, 168), but the court stated that he did not (R. 178). It appears that at least one of the three jurors, Mr. Mercer, was accepted by petitioner at a time when he had two unused peremptory challenges of the ten he thought he had,[2] and at which time he knew that Mr. Mercer had served on the Siskin jury (R. 10–14). The trial court on *voir dire* asked the jury array if any of them had formed an opinion as to the

[2] Petitioner had been mistakenly told by the clerk that he had only ten peremptory challenges, whereas he had twenty (R. 145).

guilt or innocence of petitioner and received no reply (R. 11). The court in interrogating the first prospective juror commented that he believed that no mention was made of petitioner in the Siskin trial, except that he might have bought some property, and asked if this was not correct. The juror replied that he believed that fact was mentioned one time, and to a further question from the court said it left no impression as to the guilt or innocence of the petitioner. (R. 11).

At the close of the evidence, petitioner moved for a mistrial on the ground that three of the jurors had previously sat on the trial of Siskin (R. 144). The trial court denied the motion noting that the only issue common to the two cases was the question of interstate commerce as to which issue the court was "not disturbed" (R. 146). The court further noted that the jurors had been questioned about trying the case fairly upon its own facts (R. 146).

On appeal, the judgment of the district court was affirmed, Judge Miller dissenting on the interstate commerce issue. (Pet. App. 1a–16a).

ARGUMENT

1. Petitioner contends that no federal offense was committed since the goods when stolen had ceased to be a part of an interstate shipment of freight (Pet. 11–15).

The question presented is primarily one of fact. The jury found that the shipment concerned had

not been delivered to or accepted by the consignee at the time of the theft (see Statement, *supra*). The trial court denied a motion for a new trial (R. 168–169) and the court below, after carefully reviewing the evidence (Pet. App. 5a), affirmed this finding of the trial court (Pet. App. 6a). Both courts below having found the evidence sufficient in this respect to support the conviction, there is no occasion for further review by this Court. *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589–590.

There remains the question of law, whether a shipment in interstate commerce loses its character as such when the car in which it is moving is placed on a siding at destination under its original seal to await delivery to the consignee. The conclusion of the court below that the shipment did not lose its character as an interstate shipment of freight since it had not been delivered to the consignee is in accordance with settled principles. *Chapman* v. *United States,* 151 F. 2d 740, 741 (C. A. 8); *United States* v. *Schwartz,* 150 F. 627, 628 (C. A. 2); *Murphy* v. *United States,* 133 F. 2d 622, 626 (C. A. 6); *Marifian* v. *United States,* 82 F. 2d 628, 630 (C. A. 8). Cf. *Danciger* v. *Cooley,* 248 U. S. 319, 327.

Contrary to petitioner's assertion (Pet. 4) there is no conflict of decisions. In *O'Kelley* v. *United States,* 116 F. 2d 966 (C. A. 8), the consignee had accepted delivery of the shipment,

broken the seal placed by the carrier on the railroad car, and commenced unloading the goods at the time that the goods were stolen. In *Hall* v. *United States*, 182 F. 2d 833 (C. A. 8), the prosecution had failed to show that the goods which had been stolen had in fact been stolen from an interstate shipment of freight. In the instant case, by contrast, it is undisputed that the seals placed on the cars by the carrier at the point of origin had not been broken prior to the theft, and that both cars crossed one or more state lines en route to the Southern Railway yards at Chattanooga.

2. Petitioner has not established the partiality of any of the jurors who sat at his trial. The existence of prejudice on the part of a juror cannot be presumed. *Cwach* v. *United States*, 212 F. 2d 520, 529 (C. A. 8); *Wilkes* v. *United States*, 291 Fed. 988, 990 (C. A. 6) certiorari denied, 263 U. S. 719. On *voir dire* in this case the prospective jurors were asked if any of them had prejudged petitioner and they were silent (R. 11). The court noted that the jurors were questioned about trying the case fairly on its own facts (R. 146).

The fact that three had sat on the severed trial of a codefendant is conjecture of partiality, not proof. It is weakened considerably by the fact that the testimony of the witnesses showed the transaction between themselves and Siskin and themselves and petitioner to be separate, one

from the other. The jurors could well have believed that the witnesses sold goods to Siskin, who offered no defense, and yet not believed that they sold other goods to petitioner, who denied their charges on the stand and established his good reputation in his community. Cf. *Cwach* v. *United States,* 212 F. 2d at 529; *Haussener* v. *United States,* 4 F. 2d 884, 886–887 (C. A. 8); *Wilkes* v. *United States,* 291 Fed. at 990.

The only identical issue in the two trials was the question whether the shipment had been delivered to and accepted by the consignee and had lost its character as an interstate shipment of freight. Jurors are not, however, *ipso facto* disqualified by reason of having passed upon the same issues in other trials. That fact may constitute grounds for challenge, but the question of partiality remains a fact to be determined by the trial court. *Brickey* v. *United States,* 123 F. 2d 341, 346 (C. A. 8). The exclusion of jurors is a matter within the sound discretion of the trial court. *Texas and Pacific Railroad Co.* v. *Hill,* 237 U. S. 208, 214; *Wilkes* v. *United States,* 291 Fed. at 990. Petitioner has shown no abuse of that discretion.[3]

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[3] As noted in the Statement (*supra* p. 6), the record is not clear as to whether petitioner challenged these three jurors when they were empaneled. If he failed to object at that time, this fact in itself would operate as a conclusive waiver since he knew then that they had sat on the trial of Siskin (R. 12). *Batsell* v. *United States,* 217 F. 2d 257, 260 (C. A. 8).

CONCLUSION

This case was decided by the application of established legal principles to its special facts, and no conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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